

MEMORANDUM

FEBRUARY 19, 1987

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: RICARDO A. MILLETT, ASSISTANT DIRECTOR,
NEIGHBORHOOD PLANNING AND DEVELOPMENT

SUBJECT: REQUEST FOR ADOPTION OF A RESOLUTION ENTITLED
"RESOLUTION OF THE BOSTON REDEVELOPMENT AUTHORITY
REGARDING THE SOUTH END NEIGHBORHOOD HOUSING
INITIATIVE (SENHI)" AND AUTHORIZATION TO ADVERTISE
PHASE 1 SENHI PARCELS

Background

One of the largest urban renewal plans in the nation was implemented in the South End between 1962 and 1974. The results of urban renewal were mixed. The Plan generated new housing creation and public improvements, but also caused community disruption and improper demolitions. At the same time, surrounding highway programs and commercial developments contributed to property disinvestment, arson, speculation, and extended neglect. Even though over 4,200 housing units were constructed, 3,770 households (8,800 people) were displaced as housing was demolished and vacant and abandoned buildings were removed.

During the early 1970s the South End was discovered by wealthier, younger, and largely professional households in search of prime locations close to the expanding downtown economy. Since 1980, property speculation, condominium conversions of apartments, loss of lodging houses, and declining federal housing resources for the poor have fueled high sales prices and rents, as well as lower vacancy rates. The recently intensified pressures of a tight housing market are causing a housing crisis for low and moderate income families.

The South End Neighborhood Housing Initiative (SENHI) is an opportunity to expand the supply of affordable housing in the City of Boston. Few areas in Boston other than the South End have as much city-owned land suitable for residential development. The South End is also the focus of increased residential development interest. Currently, eighteen projects totaling over 700 units of housing are underway or soon will be; and greater than half of these units are new construction. These units will add a mix of housing opportunities to the South End, but they will not be enough to meet the existing need, particularly of low- and moderate-income households. The inventory of city-owned land, strong development interest, public investment in new roads, and the removal of the elevated Orange Line combine to create a sound opportunity to begin to address critical South End concerns such as blight, housing affordability, gardens, and open space.

Program Objectives

The SENHI program has developed through a fifteen-month community process. What has emerged from that process is a program that is designed to address long-standing issues in the South End community. Among these issues are an abundance of blighted and abandoned property; the need for more affordable housing; the lack of development experience among minority and community-based groups interested in improving the South End; and impending displacement of neighborhood residents due to rising housing costs. SENHI goes beyond previous urban renewal efforts by mustering public resources and private market interest to meet community needs for housing, open space, parking, and economic opportunity.

o Creation of Affordable Housing

Creating affordable rental and homeownership opportunities for families, while protecting current residents from displacement, is a basic objective of the SENHI program. SENHI is designed to achieve the maximum number of affordable units that are financially feasible within the planning guidelines required by the community, the constraints of available resources, and the current South End market.

The first phase of the SENHI program is expected to create approximately 300 units of housing. The program requires that, of these units, one-third be affordable to low-income families; one-third be affordable to moderate-income families; and one-third be market rate. Low income housing is affordable to families earning up to 50 percent of the Boston SMSA median income. For example, a low income family of four earning up to \$17,000 would qualify. Moderate income housing is affordable to families earning up to 80 percent of the SMSA median income, or \$27,200 for a family of four. The program also encourages that a large percentage of the units created be homeownership or cooperative homeownership units.

o Increasing Development Opportunities for MBEs and CDCs

The development of real estate has become one of the most important generators of wealth in this country today. Few economic activities facilitate capital accumulation as quickly. The investment in Boston of \$3 billion in private downtown development projects since 1984 indicates the strength of the market's interest in Boston.

As strong as this development interest has been, it has not produced a sufficient revitalization of Boston's older neighborhoods, such as the South End.

Increased equity participation and access to development opportunities will be created through the SENHI program. SENHI will give selection preference to MBEs, CDCs, non-profit organizations, and joint ventures with these groups. Preference will also be given to development entities which employ MBE and CDC contracts in development-related areas.

BRA will provide technical assistance in development-related areas to MBEs, CDCs and non-profits.

- o Community Process

The community will continue to be actively involved in shaping the program elements and guidelines for SENHI. Over the past 9 months more than 15 meetings have been held with South End residents and city representatives to gain community input. The meetings covered issues such as affordability, open space and gardens, parking, technical assistance, and development scheduling.

Over 50 letters from South End residents, indicating specific suggestions to improve the initiative, were compiled and summarized in a BRA publication called SENHI Community Comments. The issues discussed in the comment letters covered the full range of topics raised in the community debate. Affordability, the time frame, gardens, open space, technical assistance, MBE preference, zoning, land use and parking were all covered.

These comments form the basis of the SENHI planning guidelines used to determine development scenarios and criteria. The community will continue its active role through all phases of SENHI.

- o Reinforcing South End Character

The South End is distinguished by an unusually high degree of architectural homogeneity and coherence. It is the largest essentially intact Victorian rowhouse neighborhood in the United States. The development of the SENHI parcels will enhance and expand this unique urban character. All development proposals, for example, will be required to conform to existing zoning, and to comply with the standards and criteria of the Boston Landmarks Commission for the district. Neighborhood environment and open space will also be reinforced and preserved for recreational and personal use.

Zoning

The community's comments indicate a clear view that all new development and rehabilitation should conform to existing zoning and should provide the necessary parking, open space, and the quality of design and materials that are typical of recent development projects in the South End. The proposed number of residential units for the SENHI parcels conform to the existing zoning code as delineated by the following density, open space, height, and parking requirements. The only variances from the Code which would be required by those scenarios would be for open space and yard requirements.

- o Density - To determine the number of units allowed on each SENHI parcel under existing zoning, the allowable gross square footage of building was determined using the floor to area ratios (FAR) set by the Boston Zoning Code. Since the parcels all fall into H-2 or H-3 zones, the buildable square footage is either 2 or 3 times the land area, respectively. This number was divided then by the number of floors assumed possible for each site. Where specific recommendations were not available, an assumption of four floors was used. This yielded the square footage of the building footprint. This number and the product of the number of required parking spaces times 180 square feet were subtracted

from the total parcel area in the case of vacant parcels to determine the amount of residual open space. As long as the amount of open space was at least 25% of that required by the Zoning Code, the estimated number of units was not reduced on the assumption that less open space in the South End is both acceptable and appropriate from an urban design perspective. In all cases the guidelines assume only residential units, and no commercial space.

- o Height - The maximum height allowed for new construction in the South End is seventy (70) feet, and the minimum is thirty (30) feet. However, any new building must conform with the height and cornice line of adjacent buildings. Rehabilitation of existing buildings must conform to the existing building envelope.
- o Parking - The basic parking requirement assumed for each parcel is .7 spaces per unit. For existing buildings, there is no parking requirement unless the proposed development varies from current use. For instance if more units than currently exist are proposed such as on Parcel SE-110 (the Allen House), then .5 parking spaces per unit would be required on every dwelling above the current number of units. However, in all cases the .7 spaces per unit is sufficient to meet current zoning requirements.

A list of the buildings and parcels included in both phases of SENHI is attached to this memorandum. A list of the buildings and parcels included in Phase 1 follows.

Vacant Buildings

1. SE-110
2. SE-116
3. RR-121
4. SE-13
5. SE-72
6. R11-C

Vacant Lots

7. RE-7B
8. 29-A
9. R-12A
10. R-12B
11. 33B

Many of the parcels offered for development are within either the South End Landmarks District or the adjacent South End Landmarks District Protection Area. Development proposals for new construction and rehabilitation of existing buildings within these areas must comply with the Standards and Criteria of the Boston Landmarks Commission for the District. For parcels located outside the boundaries of the Landmarks District, compliance with the Standards and Criteria is nevertheless strongly encouraged.

South End Housing Production Cost Model

The community planning guidelines regarding zoning, parking, design, and open space were recognized as having significant production cost implications. Greater affordability can only be achieved by lowering production costs, and the planning guidelines narrow the field of cost factors that can be reduced to increase affordability.

The BRA constructed a South End housing production cost model to determine how major cost components -- land, financing, and transactions -- could be adjusted to reduce the gap between total production costs and project income.

Land, financing, and transaction cost factors were tested within two developer models. Model I assumes the soft cost and profit expectations of a private, for-profit developer. Model II reflects the development cost assumptions of a non-profit or Community Development Corporation (CDC). In both models, cost assumptions were derived from pro formas obtained from for-profit and non-profit developers of residential development projects in the South End within the past eighteen months. Basing the production cost model on current actual experience in the South End neighborhood in our judgement rests the SENHI policy on firmer ground. Abstractions based on state or national experience could grossly exaggerate, in either direction, probable production costs. A critical analysis of this model framework and underlying cost assumptions was performed by a Boston-based private economic consulting firm.

The gap between the total development cost and project income was calculated for each model-cost scenario assuming one-third of the units are low-income, one-third are moderate-income, and one-third are market rate. Given these assumptions, the total gap remaining after the city's land contribution and the infusion of state and federal subsidies, is between \$6 and \$9.2 million. This gap to produce approximately 300 units, two-thirds of which shall be home-ownership units and one-third rental units, is on the order of other recent projects of the same magnitude and affordability requirements in this city.

Based on this analysis, the preponderance of community comments received, the need for affordable housing in the South End, and the administration's policy to dispose of city-owned land to promote affordability, Mayor Flynn has requested the following program requirements for SENHI:

- o that one-third of the units be affordable to families with incomes at or below 50 percent of the SMSA median income; one-third at or below 80 percent of the SMSA median income; and one-third at market levels;
- o that all sites comply with existing zoning and parking requirements (.7 parking spaces per unit);
- o that no disposition of garden sites be proposed until an open space plan for the South End is undertaken (accordingly, Parcels 30 and P-6A in the first phase of SENHI should remain as community gardens);
- o that historic preservation and design guidelines for the South End apply to all rehabilitation and new construction; and
- o that preference be given to MBEs, CDCs, and joint ventures involving these groups.

Mayor Flynn presented these SENHI program requirements to South End community leaders on February 12, 1987, and received wide-spread support from those individuals and organizations who are central to the SENHI community planning process.

The SENHI program requirements are the result of a community process that expresses this administration's commitment to the needs and concerns of the neighborhoods of Boston. The Board is requested to vote on the following resolution to adopt the SENHI program, and to authorize the Director to advertise the buildings and parcels in Phase 1. Upon authorization from the Board, the Phase I buildings and parcels will be advertised March 1, 1987. Teams will have 120 days to respond to the RFP with submissions; and the BRA will review the proposals and present recommendations to the Board within 90 days of the submission deadline. It is anticipated that ground-breaking could occur on these sites by Spring 1988.

VOTED: That the Authority hereby adopts a Resolution entitled "Resolution of the Boston Redevelopment Authority regarding the South End Neighborhood Housing Initiative (SENHI)" and which Resolution incorporates the policies set forth in this memorandum and attached documents; and that the Director is hereby authorized to issue a Request For Proposals (RFP) for SENHI Phase 1.

SENHI PARCEL PROFILES

<u>Phase I</u>	<u>GSF*</u>	<u>FAR</u>	<u>No. Flrs.</u>	<u>No. Units</u>	<u>Parking Spaces</u>	<u>Parking S.F.</u>	<u>Required Open Space</u>	<u>Residual Open Space</u>	<u>Building Footprint</u>
<u>Vacant Buildings</u>									
1. SE-110	8,800	2	3	9	6	-	-	-	-
2. SE-116	11,900	3	4	13	9	-	-	-	-
3. RR-121	6,000	2	3	6	4	-	-	-	-
4. SE-13	5,625	2	3	6	4	-	-	-	-
5. SE-72	<u>14,300</u>	2	4	<u>15</u>	<u>11</u>	-	-	-	-
Sub Total	46,625			49	34	-	-	-	-

<u>Vacant Lots</u>									
6. R11-C	7,947	2	4	16	11	1,980	2,400	1,994	3,974
7. RE-7B	44,920	2	3	89	62	11,160	13,350	3,813	29,947
8. 29-A	24,024	2	4	48	34	6,120	7,200	5,892	12,012
9. R-12A	23,905	2	3	48	34	6,120	7,200	1,848	15,937
10. R-12B	16,868	2	4	30	21	3,780	4,500	3,765	7,545
11. 33B	<u>9,654</u>	2	4	<u>19</u>	<u>13</u>	<u>2,340</u>	<u>2,850</u>	<u>2,478</u>	<u>4,818</u>

Sub Total	127,318			250	175	31,500	37,500	19,790	74,233
TOTAL	173,943			299	209	31,500	37,500	19,790	74,233

* GSF for vacant buildings = Gross Floor Area of existing structures; for vacant parcels = parcel size.
 ** Existing Garden Sites

<u>Phase II</u>	<u>GSF*</u>	<u>FAR</u>	<u>No. Flrs.</u>	<u>No. Units</u>	<u>Parking Spaces</u>	<u>Parking S.F.</u>	<u>Required Open Space</u>	<u>Residual Open Space</u>	<u>Building Footprint</u>
<u>Vacant Lots</u>									
12. SE-98A	1,075	2	4	2	1	180	300	358	538
13. SE-98	2,281	2	4	5	4	720	750	421	1,141
14. 20/23A**	28,030	2	4	56	39	7,020	8,400	6,995	14,005
15. R-10	35,532	2	4	71	50	9,000	10,650	8,766	17,766
16. 51-D	16,300	2	4	32	22	3,960	4,800	4,190	8,150
17. 54-6	20,120	2	4	40	28	5,040	6,000	5,020	10,060
18. PB-3A	8,949	2	4	18	13	2,340	2,700	2,135	4,475
19. RE-2B**	24,849	3	5	74	52	9,360	7,400	580	14,909
	31,348	2	4	62	43	7,740	9,300	7,934	15,674
20. RR-19**	-	2	4	0	0	0	0	0	0
21. SE-49**	-	2	4	0	0	0	0	0	0
22. SE-7	-	2	4	0	0	0	0	0	0
23. RD-36**	-	2	4	0	0	0	0	0	0
24. SE-2**	10,572	2	4	21	15	2,700	3,150	2,586	5,286
25. 5	8,543	2	4	17	12	2,160	2,550	2,12	4,272
26. 22-A	4,692	2	4	9	6	1,080	1,350	1,266	2,346
27. 34-6	4,167	2	4	8	6	1,080	1,200	1,004	2,084
28. 35A	1,858	2	4	4	3	540	600	389	929
29. 35-B	4,760	2	4	9	6	1,080	1,350	1,300	2,380
30. R-8	1,680	3	5	5	4	720	500	(48)	1,008
31. R-13	7,701	2	4	15	11	1,980	2,250	1,871	3,851
32. RC-6	7,134	3	5	21	15	2,700	2,100	154	4,280
33. RD-13**	2,080	3	5	6	4	720	600	112	1,248
34. RR-4B	3,486	3	5	10	7	1,260	1,000	134	2,092
35. RR-8	2,137	2	5	4	3	540	600	742	855
36. RR-15A	1,900	2	5	4	3	540	600	600	760
37. RR-15B	1,900	2	5	4	3	540	600	600	760
38. RR-16	1,900	2	5	4	3	540	600	600	760
39. RR-20	2,995	2	5	6	4	720	900	1,077	1,198
40. RR-22**	2,136	2	5	4	3	540	600	742	854
41. RR-26	1,150	2	4	2	1	180	300	395	575
42. RR-28	1,974	2	5	4	3	540	600	644	790

<u>Phase II</u>	<u>GSF*</u>	<u>FAR</u>	<u>No. Flrs.</u>	<u>No. Units</u>	<u>Parking Spaces</u>	<u>Parking S.F.</u>	<u>Required Open Space</u>	<u>Residual Open Space</u>	<u>Building Footprint</u>
43. RR-31	1,230	2	3	2	1	180	300	230	820
44. RR-32	5,025	2	4	10	7	1,260	1,500	1,253	2,513
45. RR-95	1,928	2	4	4	3	540	600	424	964
46. SE-88	3,064	3	5	9	6	1,080	900	146	1,839
47. SE-89	1,102	2	4	2	1	180	300	371	551
48. SE-90	1,365	2	3	3	2	360	450	95	910
49. SE-100	5,696	3	5	17	12	2,160	1,700	118	3,418
50. SE-115	2,070	2	5	4	3	540	600	702	828
51. SE-1	2,070	2	5	4	3	540	600	702	828
52. SE-121	1,500	3	5	4	3	540	400	60	900
53. SE-122	1,500	3	5	4	3	540	400	60	900
Subtotal	267,799			580	408	73,440	79,500	56,837	137,023
GRAND TOTAL	441,742			879	617	104,940	117,000	76,627	211,256

* GSF for vacant buildings = Gross Floor Area of existing structures; for vacant parcels = parcel size.
 ** Existing Garden Sites



SENHI PHASE I

LETTERS OF COMMUNITY SUPPORT

January 11, 1971

Mr. J. Edgar Hoover

FBI

Washington, D.C.

Dear Mr. Hoover:

I am writing to you

about the South End

Since the South End was established in 1967, the South End Neighborhood Service Center has been instrumental in providing a variety of services to the residents of the South End. The Center has been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities.

The South End Neighborhood Service Center has been successful in providing a variety of services to the residents of the South End. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities.

In your January 11, 1971 letter, you stated that the South End Neighborhood Service Center has been successful in providing a variety of services to the residents of the South End. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities.

Thank you for your letter. I am writing to you about the South End Neighborhood Service Center. The Center has been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities. The Center has also been successful in providing a variety of services to the residents of the South End, including food, clothing, and other necessities.

Sincerely,
James E. Brown
President, South End Neighborhood Service Center

W. J. Davis
President, South End Neighborhood Service Center

SOUTH END

NEIGHBORHOOD SERVICE CENTER

"We Still Have The Dream"



February 18, 1987

Mr. Robert Farrell
Chairperson
Board of Directors
Boston Redevelopment Authority
Boston, Massachusetts

Dear Mr. Farrell,

Since its inception in 1965, the South End Neighborhood Service Center of ABCD ("SNAP"), has been intrinsically involved in attempting to alleviate the displacement of low and moderate income families from the South End, caused by urban renewal. As we stated in our letter of December, since last March, the top priority of SNAP has been our participation in the formulation of equitable guidelines for the development of publicly owned lands in our neighborhood in the SENHI process. The SNAP Advisory Committee has discussed this issue at each of our monthly meetings over the last year, culminating in the Committee's unanimous approval of a resolution last night urging the BRA Board of Directors to approve the community compromise recommendation with respect to affordability in the Washington Corridor.

This recommendation, that of the housing to be developed in the Corridor: 1/3 should be market rate, 1/3 affordable to moderate income families, and 1/3 affordable to low income families, is the result of the South End-Lower Roxbury Ad Hoc Planning Initiative, termed by some the "non-name committee". This process, from September through December, was one of the most inclusive and comprehensive to be held in our neighborhood, and truly embraced the diversity of the South End.

In early January, the Director of the BRA agreed with this equitable recommendation, pending further study pertaining to its financial feasibility. We were most encouraged last week when both Mr. Coyle and the Mayor recommended adoption of this affordability standard in the guidelines for requests-for-proposals to be issued by the BRA Board of Directors. We are confident that the BRA Board will join with the community, the Director, and the Mayor. By so doing, you will be insuring that public policy is in line with neighborhood recommendations, and also you will be defining policy that addresses the severe crisis in affordable housing in our city.

Further, we hope that you will support Mr. Coyle's commitment that community development corporations (CDCs), especially new CDCs and non-profits, will receive adequate technical assistance, so that they can compete on an equitable basis with for-profit developers, in the creation of housing that will enhance the fabric of life in the South End.

Sincerely,

Jeannette Boyle
Jeannette Boyle

Chairperson, SNAP Advisory Committee

A handwritten signature in dark ink, appearing to read 'Pat Cusick', with a stylized flourish at the end.

Pat Cusick
Director, SNAP

cc. Robert M. Coard, Executive Director, ABCD

Melvin H. King
431 Columbus Avenue
Boston, Massachusetts 02116
(617) 267-3759

February 18, 1987

Mr. Robert Farrell, Chairperson
Board of Directors
Boston Redevelopment Authority
Boston, Massachusetts

Dear Mr. Farrell,

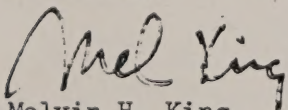
In the consideration by the Board of Directors of the Boston Redevelopment Authority of the guidelines for the requests-for-proposals for the development of publicly owned land in the Washington Corridor as proposed by Stephen Coyle, I wish to recommend, in the strongest manner, that the Board approve the proposed affordability standards, which incorporate the community compromise recommendation of housing that is 1/3 market rate, 1/3 affordable to moderate income families, and 1/3 affordable to low income families.

As I stated in my previous letter on December 23rd, the development of publicly owned land must be for the greater benefit of the public. All of us are too painfully aware of the study released this week showing that the cost of housing in our city is the highest in the nation. Because of this severe crisis in affordable housing, the greater benefit of the public, with respect to the development of public land, can be defined in no way other than the development of housing, affordable to moderate and low income residents. Even though I personally had hoped that 75-100% of the units to be developed would be affordable, I firmly support the community compromise recommendation, which was the product of one of the most comprehensive, intensive, and inclusive community planning processes to be held in Boston. There can be no doubt that this eminently fair distribution among income levels is the majority opinion of the South End.

When I grew up in the South End, it was a neighborhood of approximately 50,000 persons. The displacement resulting from the flawed redevelopment policies of previous administrations has now yielded a neighborhood of half that population, in which housing prices are such, that my children cannot afford to live in the South End. I am confident that you will support the greater public good by supporting the community compromise on affordability. When public policy is formulated from the bottom up rather than the top down both the people and government benefit to the maximum extent.

I commend both Mr. Coyle and Mayor Flynn in supporting the community position, and I am sure that your decision will coincide with the recommendations of the community, the Director, and the Mayor.

Sincerely,


Melvin H. King

February 18, 1987

The Boston Redevelopment Authority
Boston City Hall
Boston, Massachusetts

Dear ladies and gentlemen:

This is to affirm my strong support of the recommendations offered by Mayor Raymond Flynn in relation to the first phase of the South End Neighborhood Housing Initiative (SENH). As a resident of the South End, having chosen to live there when I moved to Boston, I applaud his leadership in proposing that there be an equal balance among low-income, moderate-income and market rentals in the properties to be constructed through this plan.

I also support the recommendation that there be a preference for local community development corporations, including minority and women's groups, to serve as developers. The time table of 120 days to answer the BRA's requests for proposal also seems fair. With the availability of some technical assistance, all developers should be able to meet the time requirements.

Having been involved in the neighborhood process in which a variety of opinions and proposals were aired, I am pleased that you are now in a position to approve the progressive plans which Mayor Flynn is offering.

Respectfully,

David S. King
David S. King
Vice President

30 Montgomery Street
Boston, MA 02116

City
Mission
Society

Handwritten: #161, Mr. Farrell, the letter, Hyman

THE FOUR CORNERS NEIGHBORHOOD ASSOCIATION

521 Shawmut Avenue, #1
Boston, Massachusetts 02118
February 18, 1987

Mr. Robert Farrell
Chairman
Board of Directors
Boston Redevelopment Authority
Boston, Massachusetts

Dear Mr. Farrell:

The Four Corners Neighborhood Association has been involved over the past several months in the South End/Lower Roxbury Ad Hoc Planning Initiative/No Name Committee. Our involvement was predicated by our concern on the issues of gentrification and displacement. Of particular concern was gentrification as it relates to the displacement of low-and moderate-income families.

At a community meeting held on November 3, 1986, sponsored by the Four Corners Neighborhood Association and five other community organizations (Inquilinos Boricuas En Accion (IBA), Washington Manor Tenants Council, Concerned Tenants of Grant Manor, Roxse Homes Steering Committee and their Tenants Council) the following overall General Principle was adopted:

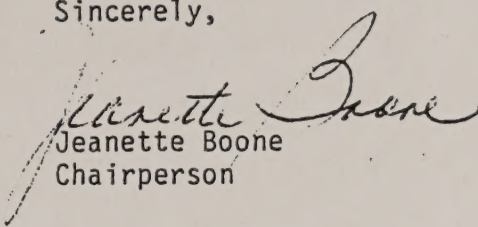
THE DEVELOPMENT OF ANY AND ALL PUBLICLY-OWNED LANDS SHOULD BE FOR THE MAXIMUM BENEFIT OF THE PUBLIC.

In light of our General Principle, we unanimously support the recommendation that housing to be developed in the Washington Street Corridor should be 1/3 market rate, 1/3 affordable to moderate income families, and 1/3 affordable to low income families. The 1/3, 1/3, 1/3 ratio is truly representative of the ethnic and economic mix of the South End community.

A proposal of 65% market rate housing would only serve the formation of an "elitist" community since only for profit developers are presently "privileged" to the private market and this "privilege" would increase the market rate housing in the South End by plus 25%.

The BRA and the City's commitment to community development corporations (CDCs), non-profits, MBEs and joint ventures is a fair and equitable process for groups that have long been shut out of the development process in the City of Boston.

Sincerely,


Jeanette Boone
Chairperson

bcc: Stephen Coyle

Mr. Robert Farrell, Chairman
Boston Redevelopment Authority
Boston City Hall
One City Hall Place
Boston, Massachusetts 02108

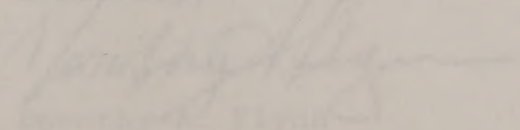
Dear Mr. Farrell:

I am writing as a community development planner and resident of the South End to urge that you and other members of the Boston Redevelopment Authority make full support of the recommendations of Mayor Flynn and Mr. Coyle for the disposition of the South End. We believe that the South End is a valuable and historic part of the City of Boston.

The recommendations of the Mayor and the BRA's Director should be accepted and implemented at the local level that best meets the needs of the community and the City of Boston. The City of Boston has a long history of supporting community development and the BRA should continue to support the recommendations of the Mayor and Mr. Coyle. The recommendations of the Mayor and Mr. Coyle are in the best interests of the City of Boston and the community.

At an earlier time, I served as a member of the Mayor's South End Committee and as a mediator for the South End of the South End Urban Renewal Project. I remember that that will be I am sure the needs of your community and I am sure that the South End Committee and the Mayor's South End Committee will support the recommendations of the Mayor and Mr. Coyle. I believe that the recommendations of the Mayor and Mr. Coyle are in the best interests of the City of Boston and the community.

Sincerely,


Stephen Coyle

725 Tremont Street
Boston, Massachusetts 02118

19 February 1987

Hand-Delivered

Mr. Robert Farrell, Chairman
Boston Redevelopment Authority
Boston City Hall
One City Hall Plaza
Boston, Massachusetts

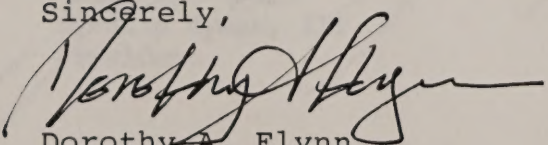
Dear Mr. Farrell:

I am writing as a community development planner and resident of the South End to urge that you and other members of the Boston Redevelopment Authority Board lend full support to the recommendations of Mayor Flynn and of Mr. Coyle for disposition of the South End Neighborhood Housing Initiative parcels and buildings in the South End project area.

The recommendations of the Mayor and the BRA Director emanate from extensive planning on the local level that represented the ideal relationship between a community and its planning agency and city administration. Mr. Coyle has put forth a series of recommendations, including time allotted for response to development guidelines and the provision of technical assistance; these recommendations should be respected as necessary for the proper participation by community development corporations and other nonprofit organizations.

At an earlier time, I served as a member of the South End Project Area Committee and as its Moderator during the closing out of the South End Urban Renewal Project. I remember those times well, as I am sure the members of your Board do, and I am very gratified that the South End community and the Boston Redevelopment Authority have grown to the current level of mutual cooperation and respect. I consider Mayor Flynn and Mr. Coyle's current positions with regard to working with the community to be nothing short of historic.

Sincerely,


Dorothy A. Flynn

United South End/Lower Roxbury Development Corporation

32 Rutland St., Boston, Ma. 02118
Telephone (617) 266-5451

February 19, 1987

Hand-Delivered

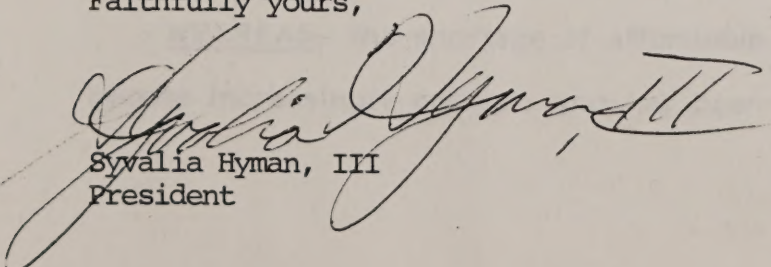
Mr. Robert Farrell, Chairman
Boston Redevelopment Authority
Boston City Hall
One City Hall Plaza
Boston, Massachusetts

Dear Mr. Farrell:

United South End/Lower Roxbury Development Corporation would like to re-affirm its support of the disposition of remaining BRA-held parcels and buildings in the South End Project Area in accordance with the community compromise position that one-third of the properties be developed for low-income housing; one-third for moderate-income; and 1/3 for market rate development. As we stated in our earlier letter to Mayor Flynn and to Mr. Coyle, we also support the extension of time allowed to respond to the RFP to the normal 120 days. We applaud both Mr. Coyle and Mayor Flynn for respecting and responding to the community's concerns with regard to the disposition of these parcels and buildings, which are critical to the future of the South End/Lower Roxbury area and to the ability of its long-term residents -- many of whom are people of color and of low income -- to remain in this area.

Mr. Coyle has been most supportive of the efforts of community development corporations and of other nonprofit organizations seeking to develop housing and has been sensitive to the need to extend the time period for submission of proposals; he has further recommended that the Authority provide technical assistance to these organizations so as to ensure full attention and technical consideration to the critical details of planning that make for better development. We urge that you and other members of the Board join us and the community at-large in supporting his recommendations.

Faithfully yours,



Syvalia Hyman, III
President

RESOLUTION OF
THE BOSTON REDEVELOPMENT AUTHORITY
REGARDING THE
SOUTH END NEIGHBORHOOD HOUSING INITIATIVE

I. HOUSING POLICY

WHEREAS, increases in property values, condominium conversions, and the market demand for housing, and the loss of federal housing subsidies, have caused high housing sales prices and rents as well as low vacancy rates in the South End; and

WHEREAS, the gross residential vacancy rate in the South End has fallen from 12.7% in 1980 to 4.4% in 1985; and the median rent in the South End for a one bedroom apartment has increased from \$148 per month in 1970 to \$225 per month in 1975, to \$430 per month in 1981, and to \$742.00 per month in 1985; and

WHEREAS, the median sales price of one, two, and three family residential buildings in the South End has increased from \$50,000 in 1975 to \$230,000 in 1984; and the supply of rental housing has been reduced by the conversion of approximately 1,400 South End rental apartments to condominiums between 1975 and 1985; and

WHEREAS, recent changes in the South End's household composition have shown a decline in the percentage of households occupied by families from 40% in 1980 to 21% in 1985; and the percentage of public housing and assisted housing units in the South End has decreased from 48% in 1978 to 37% in 1985; and

WHEREAS, the shortage of affordable housing in the South End has become increasingly critical, and has been intensified by the above-mentioned

trends; and without new low- and moderate-income affordable housing, the economic, social, and racial diversity of the South End will be threatened as housing costs exceed the financial means of most households; and

WHEREAS, the South End Urban Renewal Project of 1965, undertaken and funded pursuant to Title I of the National Housing Act of 1949 as amended by Title I of the Housing and Community Development Act of 1974, provides for the development of an economically, socially, and racially integrated community, by providing decent housing, a suitable living environment, and expanded economic opportunities for persons of low- and moderate-income; and

WHEREAS, Title I of the National Housing Act mandates that a majority of housing units redeveloped for residential use after 1968 be standard housing units for low- and moderate-income families or individuals.

II. MINORITY BUSINESS ENTERPRISE PREFERENCE

WHEREAS, as the Planning Board for the City of Boston pursuant to M.G.L. c. 41, §§70-72, the Authority's duties include studying the resources and the needs of the city, and making plans for its future development; and under the Ordinances of Boston, 1952, c. 9, §3, the Authority's responsibilities include the obligation to review and recommend city planning policies and to encourage and promote the orderly development of the city by consultation, cooperation, and liaison with public and private groups; and

WHEREAS, the Authority is also charged with the responsibility of determining if and where urban renewal projects in Boston should be undertaken pursuant to M.G.L. c. 121A and M.G.L. c. 121B, and to thereby ascertain the economic realities of Boston's private economy and the impact of both proposed and ongoing urban renewal projects; and

WHEREAS, the Authority, in its dual capacity as an urban renewal agency and as the Planning Board of the City of Boston, is responsible for regulating the private development economy through recommendations to the Zoning Commission on zoning matters, through recommendations to the Board of Appeal on applications for zoning relief; through its land use planning activities, through the urban renewal process set out in M.G.L. Chapter 121A and 121B, through the design and environmental review process, and through its other responsibilities; and

WHEREAS, the Authority carries out its responsibilities through a staff of approximately 300 persons, 20 of whom work in the area of research and 50 of whom function as city planners or community development specialists, with the Authority regularly conducting studies on all phases of the economy of the City of Boston and on how past and future development affects the lives of the citizens of Boston; the Authority prepares numerous reports annually to carry out this responsibility, and has generated extensive expertise in all areas relating to real estate development and city planning in Boston in the twenty-eight years of its existence; and

WHEREAS, based upon past experience, the information it has gathered, and extensive working relationships with the public and with private development groups, the Authority finds that absent a special effort to provide access for minorities to the development economy, such access will not occur; further, the Authority finds that absent the opportunity to participate in all aspects of the growth economy, minorities will be deprived of the chance to reverse the rising incidence of poverty in minority communities; and

WHEREAS, the Authority takes cognizance of the fact that governmental bodies have found that minorities are underrepresented in the attainment of economic and development opportunities in the City of Boston, the State of

Massachusetts, and the United States, and that such governmental entities have recognized and sought to redress this inequity through the enactment of various laws and executive orders, including but not limited to the following:

- o Mayoral Executive Order of June 28, 1978, entitled "Encouraging Minority Business Enterprise", which Order is designed to assure the participation of Minority Business Enterprises (MBE) in the city's contracting process by requiring a ten percent (10%) MBE set-aside of the value of all construction, goods, and services procured by the city during each fiscal year, and by further requiring a thirty percent (30%) set-aside in "impact areas".
- o Municipal Law, Chapter 30, Ordinances of 1983, entitled "The Boston Residents Jobs Policy", which states that Black, Hispanic, Asian, and Native American residents of the City of Boston have historically been systematically excluded from the construction trades and unions in the City of Boston, and which requires that twenty-five percent (25%) of the total employee person-hours on any construction project funded in whole or in part by city funds be worked by minorities.
- o Mayoral Executive Order of July 12, 1985, entitled "Extending the Boston Residents Job Policy", which Order states that the exclusion minorities from the construction trades and unions in the City of Boston is still prevalent, and that such exclusion can and does exacerbate racial tensions as a result of the competition for scarce construction jobs, and which requires that twenty-five percent (25%) of the total employee person-hours on major private projects and substantial rehabilitations receiving zoning relief be worked by minorities.
- o Boston City Council Order of January 30, 1985, entitled "Development Guidelines for the Dudley Square Development District", which orders that the development guidelines for all parcels within the District include equity participation by community organizations and minority entrepreneurs.
- o City Ordinance of 1986 entitled, "The Boston Employment Commission", which establishes a body to encourage and foster the progress of Boston residents in securing construction jobs and permanent employment in the Boston economy; the Commission has the authority to require developers of Covered Projects to submit: (i) detailed plans that show how the developer intends to meet the Boston Resident Construction Jobs Standards; and (ii) detailed plans that show how the developer intends to meet MBE/WBE goals contained in City contracts or that arise from city, state, or federal laws, regulations, or policies.
- o State Executive Order 237, issued March 19, 1984, entitled "Minority Business Development", which Order states that it is based on the fact that Minority Business Enterprises (MBEs) frequently face inordinate problems in achieving viable economic status, and which provides that each executive office, agency, department, board and commission must award at least ten percent (10%) of the total value of construction projects let by it in each fiscal year to MBEs, and at least five percent (5%) of the total value of contracts for supplies and services to MBEs.

- o Regulations of the Department of Housing and Urban Development Pertaining to Urban Development Action Grant (UDAG) Eligibility, such as 24 CFR s.570.459, which regulation provides for Minority Job Participation in UDAG projects, including participation as equity investors, owners or rehabilitators of property, prime or sub contractors during development, and vendors and suppliers of goods and services; and 24 CFR s.135.1(a), which regulation requires that opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any such program be given to lower income persons residing in the area of the project.
- o Regulations of the Department of Housing and Urban Development Pertaining to Community Development Block Grant (CDBG) Eligibility, such as 24 CFR s.570.602(4)(i) and (ii), which regulations provide for a recipient of CDBG funds who has previously discriminated against minorities to take affirmative action to correct that discrimination, and further directing said recipient, even in the absence of such prior discrimination, to take affirmative action to overcome the effects of conditions which might otherwise result in limiting the participation of persons of a particular race of color.

WHEREAS, the Authority finds that all of the above-cited city, state, and federal actions, ordinances, regulations, and executive orders establish a backdrop of public policy and a rational basis which allows the Authority to be definitively aware of the widely recognized problems that face minorities in Boston and in the Commonwealth in the fields of government contracting, construction employment, procurement, and employment; and

WHEREAS, based on its own analysis of federal, state, municipal, and private reporting data, and based on an extensive household survey of Boston in 1985, the Authority finds that the following conditions affect minorities in Boston.

- o Minority Employment Lowest in Downtown Economy. As a regional economic center, Boston provides employment opportunities for over 583,000 workers. In the last nine years, Boston has added 83,000 new jobs; another 10,000 are expected to be generated in 1986. The 2.2 square mile area of downtown enjoys the vast majority of all new real estate development and business activity while many neighborhoods receive little investment. Moreover, both the number and proportion of Boston jobs held by residents have fallen sharply over the past 25 years: down from 235,000 (44%) in 1960 to 181,000 (31%) in 1985. A recent study, conducted by the Authority, indicates that residents' share of downtown office jobs has dropped further; the share of minority resident workers employed downtown is even lower, at 16%.

- o Median Income and Wages Lower for Minorities. Although the level of per capital income in Boston remains relatively low, its growth rate outpaced those of the metropolitan area, the Commonwealth, and New England between 1982 and 1984. Average annual wages have been consistently higher in the city than in the metropolitan area and the Commonwealth each year between 1980 and 1984. Yet, due to the larger share of commuters holding professional jobs, Boston's resident per capita income is significantly lower than that for the suburbs. Among city residents, median income for white households is \$22,543, compared to only \$13,699 for minority households.
- o Unemployment Rate Significantly Higher for Minorities. Boston's employment has grown in recent years, to a high of 583,000 in 1985, reflecting the city's specialization in the broad range of services-based industries, the fastest-growing sectors of the national economy. Downtown employment at 280,000 increased by over 18,000 (6.3%) between 1982 and 1985, accounting for almost 60% of total job growth in the city. Business and professional services generated more than half of the new jobs. Jobs in the city grew by 83,000 from 1976 to 1985, including 35,000 alone in the last three years. Unemployment rates have fallen from a Boston high of 12% in 1975 to 4.6% by 1986, over 2.5 points lower than the national rate. The unemployment rate for minorities, however, is 10%, compared to only 3% for whites.
- o Low Minority Participation in the Growth Economy. Over the past 15 years, minorities have represented a growing share of Boston's residents; from 18% in 1970, to 34% of the city's current population. Black residents constitute 23% of Boston's total population, Hispanic residents 7%, and Asian residents 4%. Minorities are expected to constitute up to 40% of the Boston population by 2000. Boston's minority residents do not participate in business to a degree consistent with the minority share of the population. Although the number of Black-owned enterprises more than doubled from 1977 to 1982, the number of Black-owned firms with paid employees decreased. Only 123, 10%, of the Black-owned businesses in Boston had paid employees in 1982; 90% of Black-owned businesses were individual enterprises. Black-owned firms with paid employees accounted for less than 1% of the total business establishments in Boston, far below the 23% share of the city population accounted for by Blacks. Furthermore, Black firms averaged six employees per firm, compared to the city average of 24.
- o No Evidence of Minority Participation in Equity in the Development Economy. Boston has experienced unprecedented growth, yet numerous studies and reports indicate that minority developers and business enterprises have not participated in or been benefitted by major development projects in Boston to any significant extent. There is no record of significant minority involvement in the ownership, management, design, or operation of downtown buildings. In a comprehensive report entitled The Emerging Black Community of Boston (Institute for the Study of Black Culture, University of Massachusetts at Boston, October 1985), the authors' examination of statistical data, studies, and interviews with minority developers and businessmen lead them to conclude that:
 - "No Black developer has a hand in shaping the new physical form the city is taking."

- "No large Black business has emerged in the city's economic renaissance."
- "Blacks are often victims of discrimination with respect to job opportunities in Boston."

The study also states that Blacks are excluded from the boards of directors of literally all of the city's most influential businesses and institutions, and from executive managerial and administrative positions. A study by the Authority entitled Indicators of Minority Participation in Boston's Growing Economy (September 1986) confirms that, in 1985, Whites held 80% of such jobs while Blacks held 12%, Asians 5%, and Hispanics 4%. The significance of this imbalance is not only that professional/technical/managerial jobs are higher paying, but that these job categories are expected to account for 37% of the total job growth between 1985 and 1990. Similarly, minorities held a disproportionately small share of jobs in the construction sector, one of the fastest growing sectors in the Boston area. Of construction jobs held by Boston residents in 1985, only 11% were held by Blacks, 8% by Hispanics, and less than 1% Asians.

- o Strong Economic Outlook Provides Opportunity to Remedy Underrepresentation of Minorities. Projections of Boston job and economic growth over the next 10 to 20 years by local and national sources reveal a continuing economic resurgence. Boston's employment is forecast to grow at an annual pace of 10,000 jobs through 1995 with a greater estimated increase for areas outside of the downtown core. The service and finance sectors will remain the leaders but some newer growth in manufacturing, construction, and retailing is expected. Boston's bright economic picture is underscored by national projections of regional growth. The Department of Commerce ranks metropolitan Boston to have the third best job growth of the 30 largest metro areas in the nation to the year 2000, while the National Planning Association rates metro Boston as seemed to Los Angeles in job growth potential.

WHEREAS, the Authority takes cognizance of the Parcel to Parcel Linkage Program and the September 25, 1986 Resolution of the Authority adopted pursuant thereto, and the Authority adopts for the purposes of this Resolution all documents, reports, studies, and other materials submitted with such Resolution which show a basis for establishing a minority preference program; and

WHEREAS, the Authority takes cognizance of the fact that the South End Urban Renewal Project was undertaken pursuant to Title I of the National Housing Act of 1949, which governs the operation of this project, and that

Title I of the National Housing Act of 1949 has been amended by Title I of the Housing and Community Development Act of 1974; the Authority further takes cognizance of regulations promulgated pursuant thereto, in particular 24 CFR 570.602(4) (ii), which provides that even in the absence of prior discrimination, a recipient in administering a program or activity funded in whole or in part with Community Development Block Grant funds should take affirmative action to overcome the effects of conditions which would otherwise result in limiting participation by persons of a particular race, color, national origin or sex; where previous discriminatory practice or usage tends, on the ground of race, color, national origin or sex, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice of usage, and to accomplish the purpose of the Act. The regulation also provides that a Community Development Block Grant recipient shall not be prohibited from taking any eligible action to ameliorate an imbalance in services or facilities provided to any geographic area or specific group of persons within its jurisdiction, where the purpose of such action is to overcome prior discriminatory practice or usage; and

WHEREAS, the Authority takes cognizance of records showing that in the projects approved in two recent reports, entitled "Downtown Projects" and "Downtown Projects II," there has not been a single minority developer engaged in the private development of large commercial projects in the City of Boston; these two reports recommend the approval of sixteen large-scale projects with a total development value of over \$1,556 million. The Authority

also takes cognizance of the extensive reports and other data contained in the domain of the Authority which show that minorities are underrepresented in development activities relating to development projects in the City of Boston; and

WHEREAS, based on the above-cited backdrop of public policy, reports conducted by the Authority, extensive materials gathered on minority development opportunities for the Parcel to Parcel Program, and the Authority's experience and knowledge of the private real estate economy, the Authority finds that an underrepresentation of minority developers exists in the development of real estate projects in the City of Boston; and

WHEREAS, the Authority finds that the exclusion of minorities from the real estate development economy acts to restrict the number and diversity of market participants, and thereby, adversely affects the quality of development in Boston; and further, that such exclusion shows no immediate signs of being reversed without affirmative action being employed; and further, that affirmative action is required to build the capacity of minority developers to compete effectively in the market economy free from affirmative action measures; and

WHEREAS, the Authority finds that the City of Boston has a good opportunity to improve the economic standing of its residents, especially minorities, if access is provided to the predominately privately financed growth economy; and

WHEREAS, in designing and developing the South End Neighborhood Housing Initiative (SENH I) the Authority has conducted over 35 public forums to give all interested members of the South End community an opportunity to comment on all aspects of the program, including the affordable housing component and the minority preference provision. In addition, written public

comment has been solicited and considered and incorporated in the final formation of SENHI, and the Authority has considered the following studies, among others, in designing and proposing SENHI:

- o "Residential Property Values," BRA, 1986
- o "Condominiums Update," BRA, 1986
- o "Boston's Changing Housing Patterns," BRA, 1986
- o "South End Profile," BRA, 1986
- o "BRA/PFD Housing Survey", Center for Survey Research, UMass-Boston, 1985

WHEREAS, the courts of the United States have recognized and approved the giving of a preference to minorities as a factor to be considered in government decision-making processes and the South End Neighborhood Housing Initiative contains such a preference, the Authority hereby takes due notice of the legal requisites for promulgating such a program and finds that such requisites have been satisfied.

- o The governmental body adopting the plan must have the authority to choose such a remedy. The Authority is clearly an entity competent to adopt and implement an affirmative action plan. The Authority acts as a redevelopment authority pursuant to M.G.L. c.121B; as the State Housing Board in connection with the administration of urban renewal projects pursuant to M.G.L. c.121A; and as the Planning Board of the City of Boston pursuant to M.G.L. c.41, s.70.
- o The Plan must have a valid remedial aim, designed to eliminate the effects of past discrimination. The Authority has herein referenced numerous studies, reports and statistical data, collected and compiled by the Authority in its role as an urban renewal agency and as the Planning Board of the City of Boston, and has conducted hearings and community meetings and has herein determined that this program is necessary to remedy the exclusion and underrepresentation of minorities at all levels of the development process, and to enable minorities to share in the economic benefits of the South End Urban Renewal Project's completion.
- o The Plan must be narrowly tailored to its remedial aim. South End Neighborhood Housing Initiative (SENHI) is a demonstration program, and as such it is necessarily of finite duration and scope. The program is limited to 53 development sites which represent less than 10% of the parcels involved in the South End Urban Renewal Project, and no preference for minority developers was given previously in the project. Moreover, the fact of minority status is only one factor to be considered in designating developers under SENHI. Therefore, the program's effects on the non-minority population would be deemed minimal under existing judicial standards. SENHI, as specified further herein, also

requires that any minority business enterprise designated as a developer on this project have the capacity to carry out the development. The program therefore responds to businesses which are already able to meet these requirements, and who can thereby share in previously curtailed opportunities.

III. RESOLVE

THEREFORE, be it resolved that the Authority hereby adopts the South End Neighborhood Housing Initiative (SENHI), a comprehensive program designed to accomplish the objectives of the South End Urban Renewal Plan and to further the Flynn Administration's goal of increasing the city's housing supply, particularly the supply of affordable housing. SENHI as hereby adopted and set out in the attached documents is specifically designed to use the Authority's land and technical resources to achieve the following goals:

- o Eliminate blight by returning vacant Authority-owned land and deteriorating structures to productive use.
- o Create up to 700 new and rehabilitated, rental and ownership, housing units.
- o Create a supply of affordable housing by requiring that one-third of new and rehabilitated units be affordable to low-income families, that one-third of new and rehabilitated units be affordable to moderate-income families, and that one-third be sold or rented at market rates.
- o Preserve and create open space and gardens.
- o Promote development opportunities for Minority Business Enterprises (MBEs), Community Development Corporations (CDCs), and nonprofit organizations by giving selection preference to such organizations, or joint ventures with these groups.
- o Provide technical assistance to emerging development groups and to thereby enhance the capacity of such groups to compete effectively in the private market economy.
- o Reinforce the South End's historic character and neighborhood environment by requiring that all new construction and rehabilitation projects conform to existing zoning, including height, density, and parking (.7 spaces per unit), and that all projects comply with historic preservation and urban design criteria.
- o Encourage home ownership opportunities for first-time home buyers through the use of cooperatives or other innovative forms of equity participation.

TO: THE BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: SAUL A. SCHAPIRO, ESQUIRE
SCHAPIRO & MARGOLIN

SUBJECT: ANALYSIS OF RELATION OF SENHI PROGRAM TO
PROVISIONS OF THE SOUTH END URBAN
RENEWAL PLAN

This memorandum will address the issues of (1) whether the adoption by the Boston Redevelopment Authority of the SENHI program will require a modification of the South End Urban Renewal Plan, and (2) if such a modification is required whether it is a minor or a substantial modification.

Despite the fact that the SENHI program as conceived may be characterized as a significant undertaking by the BRA and the Mayor, it does not itself constitute a modification of the South End Urban Renewal Plan. Unlike many other urban renewal plans, the South End Urban Renewal Plan (South End Plan) always had as its objective creating an economically, socially and racially integrated community. Chapter II of the plan sets forth the Objectives of the Plan. Section 201 contains the plan's Basic Objectives and states in relevant part:

The basic objectives of urban renewal action in the South End Urban Renewal Area are to eliminate severe conditions of blight, deterioration, obsolescence...etc.

Specifically, the objectives are to:

d/ Provide an economically, socially and racially integrated community;...

Section 203 of the plan sets forth the planning and design objectives of the project. It states:

Planning and design objectives described below are developed in accordance with the basic concept described in Section 202. There are to:

d/ Provide, in appropriate areas, new housing units which provide the highest level of amenity, convenience, usefulness and livability which are within the income requirements of the residents of the community;

p/ Create a physical framework which will facilitate the formation and execution of programs to cope with social and economic problems in the community.

The SENHI program has as its primary objective the creation of residential housing in the South End. This objective is, of course, consistent with the original purposes of the South End Plan. The centerpiece of the SENHI program is the creation of affordable housing. SENHI calls for one third of the housing to be created to be affordable by low income persons, and one third to be affordable by moderate income persons. The remainder will be market rate housing. This program is totally consistent with the objective of the urban renewal plan as originally written which calls for providing an economically, socially and racially integrated community. (Section 203 quoted above).

SENHI also contains within it a minority business preference in the selection of redevelopers for SENHI parcels. The legal support for a minority preference program is set forth in a separate memorandum submitted herewith. This aspect of the SENHI program is also consistent with the objectives of the South End Urban Renewal Plan. One objective of the Urban Renewal Plan is to create a racially integrated community (Section 201). Another objective is to create a physical framework which will facilitate the formation and execution of programs to cope with social and economic problems in the community (Section 203). The encouragement of minority business entities as developers serves both needs. The minority business preference in selection of

developers is only one of several components of the SENHI Plan which is designed to provide an economically, socially, and racially integrated community.

In adopting the SENHI program, the BRA therefore is not changing the objectives of the plan. What it is doing rather is declaring that in carrying out the objectives of the plan it will be using the SENHI criteria for analyzing proposals for completing the plan as it was originally conceived.

Assuming that the SENHI program is consistent with the objectives of the South End Urban Renewal Plan, the next question is whether the means which will be used to accomplish the program's objectives are consistent with those contained in the plan. Chapter III of the South End Plan, Section 301, entitled "Proposed Types of Renewal Action," provides:

Proposed types of renewal action within the Project Area shall consist of combination of clearance and redevelopment activities, changes in land use, provision of public improvement and facilities, rights-of-way and utilities changes, zone district changes, and rehabilitation activities.

Such "Clearance and Redevelopment Activities" were listed in section 302 as:

- a/ acquisition of real property;
- b/ management of acquired property;
- c/ relocation of the occupants of acquired property;
- d/ clearance of buildings from land;
- e/ installation, construction and reconstruction of improvements; and
- f/ disposition of land and other property in accordance with the building requirements, land use and other provisions of this Urban Renewal Plan.

Section 303, entitled "Rehabilitation Activities" provides:

Rehabilitation activities may include, but are not limited to:

- a/ systematic enforcement of rehabilitation standards, set forth in Chapter VIII;
- b/ technical assistance;
- c/ rehabilitation demonstrations;

- d/ acquisitions and dispositions of real property for rehabilitation in accordance with the land use requirements and rehabilitation standards set forth in the Urban Renewal Plan; and
- e/ acquisition, retention, management, rehabilitation, disposition or clearance of real property which is not made to conform to rehabilitation standards set forth in the Urban Renewal Plan.

The SENHI Program will be carried out by disposing of land and other property (Section 302 "f") which the BRA has acquired in the course of administering the South End Urban Renewal Plan (Section 302 "a"). It will also involve rendering technical assistance to redevelopers (Section 303 "b") and disposing of real property for rehabilitation (Section 303 "d"). The mechanisms to be utilized by the BRA in carrying out the SENHI program, therefore, have already been provided for in the South End Urban Renewal Plan as originally drafted.

In sum, the BRA need not amend the South End Urban Renewal Plan to adopt the SENHI program in principle. What the BRA is doing by this action is publicly declaring how it intends to exercise its discretion in carrying out its obligation to complete the South End Urban Renewal Project.

The BRA has previously made policy statements about its intentions in the South End. A document entitled "Subsidized Housing in the South End" was prepared by the BRA in April of 1974 and revised and reissued in September of 1978. The BRA also took the opportunity to discuss its policy in relation to the South End Project when it prepared an Environmental Impact Statement in the Spring of 1979 as part of the closeout of the federal involvement in the South End Urban Renewal Project. In neither instance was the declaration of policy contained in a plan modification.

This is not to say that no modification of the South End Urban Renewal Plan of any sort will be necessary in implementing the SENHI program. To be sure, when each particular parcel is conveyed to a redeveloper for a particular purpose, the BRA must look to the original plan to see what the designated use or reuse of that parcel was to have been. If the proposed reuse is the same as originally described no plan modification will be necessary. If the reuse is different, a plan modification will be required. If there is to be an affordability provision regarding reuse that also might require a modification of the plan.

The BRA staff has prepared a document entitled "Proposed Reuses For SENHI Parcels," dated September 1986, which compares on a parcel by parcel basis the original reuse designation of the plan with the SENHI proposed reuse. This document provides a starting point for determining if any plan modifications will be needed. By only modifying the plan on a parcel by parcel basis when dispositions are made, the BRA Board avoids the necessity of modifying the plan needlessly, or modifying the same parts of the plan numerous times as proposals for reuse evolve between the original request for proposal stage and the final disposition. This is the procedure that has always been followed in the many modifications of the South End Plan which have been made from its original adoption to date.

Chapter XII of the South End Plan contains the provision for Modification and Termination of the Plan.

Section 1201, entitled "Modification" provides as follows:

The Urban Renewal Plan may be modified at any time by the Boston Redevelopment Authority, provided that, if the general requirements, controls, or restrictions applicable to any part of the Project Area shall be modified after the lease or sale of such part, the modification is consented to by the redeveloper or redevelopers of such part, or their successors and assigns.

Where proposed modifications will in the reasonable opinion of the Authority, substantially or materially alter or change the Plan, such modifications must also receive the necessary Federal, State and local approvals.

The BRA retains the sole authority to modify the plan for any parcel which has not been leased or sold. The Parcels which will be the subject of the SENHI program have neither been leased or sold, therefore it is the BRA's exclusive prerogative to modify the plan as respects those parcels.

The Supreme Judicial Court considered the BRA's role in modifying existing urban renewal plans in the case of Commissioner of Department of Community Affairs v. Boston Redevelopment Authority, 289 N.E.2d 867, (1972).(DCA). In that case the Department of Community Affairs of the Commonwealth of Massachusetts took the position that since it had originally approved the urban renewal plan at issue, it had the right to oversee the execution of the plan, and its permission was needed to change or amend the urban renewal plan. The Court disagreed, stating that the BRA was the sole entity responsible for overseeing the proper execution of the plan including deciding when and if a plan should be modified. It reasoned as follows:

Fifteen years of history have served amply to demonstrate that the West End project is not only substantial but is highly complex. Through such a period, change in the economy, change in construction costs, and change in what might constitute the best use of the area demanded constant flexi-

bility in settling on plan designs. Were each plan revision required to be submitted for the DCA approval on a day to day, or even month to month basis, a hopeless administrative morass would develop. Such a dilemma could only thwart the main objective. This could not be deemed a legislative aim nor would it satisfy the requirements of common sense. DCA, at p.875.

The court went on to state that "as a matter of legislative judgment the local agency, in this instance the BRA...has been granted the basic responsibility for the proper execution of the plan." DCA, at p.876.

What the Supreme Judicial Court said of the West End Plan is clearly applicable to the South End Plan. Both plans were adopted pursuant to M.G.L. Chapter 121, the predecessor statute to M.G.L. Chapter 121B. Both urban renewal plans, moreover, provide that the plans may be modified by the BRA, at its sole discretion.

The Supreme Judicial Court, moreover, has repeatedly held in cases involving c.121B and its predecessor c.121 that it is the prerogative of an urban redevelopment authority to decide where and if an urban renewal project should be undertaken, as well as the scope thereof. The action or refusal to act of the local redevelopment authority relative to c.121 or c.121B projects are within the authority's discretion and can only be overturned by a court if they are found to be "arbitrary and capricious." Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, 53, 371 N.E.2d 728, 739-40 (1977). See also, Moscow v. Boston Redevelopment Authority, 349 Mass. 553, 210 N.E.2d 699 (1965); McAuliff & Burke Co. v. Boston Housing Authority, 334 Mass. 28, 133 N.E.2d 493 (1956).

The next question is whether any proposed modification of the South End Plan will "substantially or materially alter or change the plan" so as to require federal, state or local approvals.

It must be emphasized that it is the BRA itself which determines (in its reasonable opinion) if proposed changes substantially or materially alter or change the plan. (Section 1201, second paragraph). The BRA's decision on this matter would be given great weight by any reviewing court.

As stated above, the objectives of the SENHI program are consistent with the objectives of the South End Urban Renewal Project as originally enacted. What the BRA is doing in adopting SENHI is adjusting the plan to keep pace with "change in the economy, change in construction costs, and change in what might constitute the best use of the area" to apply the language of DCA. It follows that any modifications of the plan necessitated by implementing the SENHI program would be minor modifications which do not substantially or materially alter the plan.

The Supreme Judicial Court, moreover, has held that in evaluating whether a modification of an urban renewal plan is minor or substantial, one looks to the effect of the modification on the plan as a whole and not to the effect on any single parcel.

Any assessment of the magnitude of the September 9, 1971, revisions must be made with reference to the plan as a whole, not simply with reference to the affected parcel. The plan has been developed as a comprehensive scheme for a large, integrated area; even a change which totally altered one small parcel might have only a negligible effect on the overall nature of the development. DCA, at p.878.

According to the information supplied by the BRA staff to counsel, the entire SENHI program affects less than 10% of the

land and buildings in the South End Urban Renewal Project, and as little as 1% of the land and buildings in the South End neighborhood. Thus, even if a plan modification was needed for every parcel (which is unlikely) and even if the modifications were major in relation to each parcel (again unlikely) and even if all modifications were made at the same time (they will not be and should not be) the impact of all the changes and modifications would not materially or substantially alter the plan when assessed with reference to the plan as a whole. See also, Boston Edison v. Boston Redevelopment Authority, 324 Mass. 37, 371 N.E.2d 728 (1977).

In summary therefore it is the opinion of counsel that:

- 1) The adoption of the SENHI program in principle does not require a modification of the South End Urban Renewal Project as it is consistent with the objectives of that plan and will be enacted using urban renewal means recognized by the plan. Adoption of SENHI is not a modification of the South End Plan but rather a statement of policy as to how the BRA intends to complete the urban renewal project;
- 2) Modifications of the plan may be necessary at the time individual developers are designated to develop specified parcels. These modifications may be needed to change reuse provisions or to incorporate affordability criteria;
- 3) Each modification, whether viewed on a parcel by parcel basis or as a single modification are "minor modifications" and should not be viewed by the BRA in its reasonable opinion as substantially or materially altering the plan because:
 - 1) They are in keeping with the original objectives of the South End Plan and;
 - 2) They affect less than 10% of the land and buildings contained in the South End Urban Renewal Project.

TO: THE BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: SAUL A. SCHAPIRO, ESQUIRE
SCHAPIRO & MARGOLIN

SUBJECT: ANALYSIS OF THE LEGAL STATUS OF MINORITY DEVELOPER
"PREFERENCE" PLANS AS SUCH LAW RELATES TO THE
SOUTH END NEIGHBORHOOD HOUSING INITIATIVE (SENHI)
PROGRAM

INTRODUCTION

On September 25, 1986, this firm prepared an analysis of the legal status of affirmative action set-aside plans as such law related to the Kingston-Bedford/Parcel 18 proposal. (See attached). This memorandum represents an update of the case law relating to affirmative action plans since that time, as well as an examination of the analytic differences between numerical set-aside plans and "preference" plans..

RECENT DEVELOPMENTS

As noted in the memorandum of September 25, the law relating to affirmative action is in flux. The Supreme Court's decision in Wygant v. Jackson Board of Education, 106 S.Ct.1842 (1986), indicates that affirmative action plans will be subject to increasingly strict judicial scrutiny, with courts closely evaluating the findings relied upon by the governmental entities adopting such plans.

In October of 1986, the Sixth Circuit Court of Appeals struck down a municipal ordinance giving a bidding credit on city

supply and service contracts to minority groups. See, Edinger v. City of Louisville, (No.85-6057, 6th Cir., October 1986).

The ordinance at issue in Edinger was enacted after the city found that there was a numerical disparity between the percentage of contracts awarded to minority businesses and the percentage of minorities in the city. The court held that this finding, based solely on population statistics, was not sufficient to justify the city's affirmative action plan. Relying primarily on Wygant, the court held that more sufficient evidence was required, as the city had to demonstrate that its remedial action was based on a finding of prior governmental discrimination.

While the Edinger court struck down the plan on other grounds as well (such as the lack of a durational limitation), the case indicates the growing tendency of courts to closely scrutinize affirmative action plans and the findings relied upon to justify them.

"PREFERENCE" PLANS

While any race-conscious remedy is likely to be subject strict scrutiny, case law reveals that "preference" plans can be analyzed in a slightly different manner than strict set-aside plans. In University of California Regents v. Bakke, 438 U.S. 265 (1978), the Supreme Court struck down an affirmative action

program that set aside a prescribed number of admission slots to medical school for minority applicants. However, the Court, in a plurality opinion by Justice Powell, agreed that race could at times validly be considered a factor in government selection procedures. While Justice Powell would not uphold a straight numerical quota, he would allow race or ethnic background to be deemed a "plus" in a particular applicant's file. So long as that applicant was judged in an open process, with race merely being taken into account as one of many criteria for admission, there would be no constitutional infirmity with such a process. Id., at 315-319. (Opinion of Powell, J.)

This notion of using race as a "plus" has been extended beyond the school admissions area. In a case involving a preference or enhancement plan very similar to the one envisioned in the SENHI proposal, Judge Skelly Wright wrote an influential and well-reasoned opinion for a unanimous court, upholding the use of minority preferences. See, West Michigan Broadcasting v. FCC, 735 F.2d 601 (D.C. Cir.1984), cert.denied, 470 U.S. 1027 (1985). In West Michigan Broadcasting, the court upheld an F.C.C. procedure which accorded a "substantial enhancement" to a minority's application for ownership of a radio station. In his opinion, Judge Wright reasoned that:

"[T]he Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but

one factor in a competitive multi-factor selection system..."

735 F.2d at 613 (emphasis in original).

The court thus felt that the F.C.C. procedure came within the ambit of Bakke and its progeny, and was constitutionally defensible due to the fact that race was not the sole decisive factor in the contract award process. Likewise in SENHI, race will be but one factor in a multi-factored decision-making procedure which would take into account other criteria such as the speed at which a given project will be implemented, and the proposed project's impact on the community. Preference also will be given for CDC's and non-profit corporations.

In our memorandum of September 25, (at pages 4-8) we discussed the need for a governmental body to make "findings" to support the adoption of affirmative action plans. A "preference" plan likewise requires findings. The SENHI resolution which the Board will adopt should include several pages referencing hearings, statistics and studies which demonstrate the need for the minority preference aspects of the program.

There is another basis, as well, for upholding the minority preference provisions of the SENHI program. In West Michigan, the court noted that there was a longstanding policy of the F.C.C. to grant minority preference in awarding licenses 735 F2d 612. Congress had never overruled

this administrative policy. Similarly, Congress has been aware of, and not overruled, HUD regulations enacted pursuant to Title I of the Housing and Community Development Act of 1974, the Community Development Block Grant Program. This program is the successor to Title I of the National Housing Act of 1949. The regulations at issue are found at 24 CFR 570.602, et seq. In those regulations, HUD requires the entity administering a program funded in whole or in part with CDBG funds who has previously discriminated against persons on the ground of race, color, national origin or sex to take affirmative action to overcome the effects of prior discrimination. 24 CFR 570.602 (4)(i). The regulation continues by stating that affirmative action programs are desirable even in the absence of past discrimination:

Even in the absence of such prior discrimination, a recipient in administering a program or activity funded in whole or in part with CDBG funds should take affirmative action to overcome the effects of conditions which would otherwise result in limiting participation by persons of a particular race, color, national origin or sex.

The regulation continues further, stating:

Where previous discriminatory practice or usage tends, on the ground of race, color national origin or sex, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purpose of the Act.

24 CFR 570.602 (4) (ii)

This HUD regulation constitutes a mandate that recipients of urban renewal funds should, where appropriate, implement reasonable programs of affirmative action. The B.R.A. does take cognizance of this regulation in the SENHI resolution.

Given the fact that the SENHI plan is a "preference" plan, where race is but one of many factors taken into account in the selection process, and given the plan's limited duration and the fact that the SENHI only applies to the remaining ten percent of the entire South End Urban Renewal Project, it would appear that the minority preference section of the SENHI program is constitutionally defensible.

MEMORANDUM

September 25, 1986

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: SAUL A. SCHAPIRO, ESQUIRE
SCHAPIRO & MARGOLIN

CONFIDENTIAL

SUBJECT: AN ANALYSIS OF THE LEGAL STATUS OF AFFIRMATIVE
ACTION PLANS AS SUCH LAW RELATES TO THE
KINSTON-BEDFORD/PARCEL 18 PROPOSAL.

This memorandum addresses the constitutional requisites that must be met in order to promulgate an affirmative action set-aside plan. Subsumed within this discussion is an analysis of the type of "findings" that a governmental entity must make in order to justify such a plan.

I. CONSTITUTIONAL REQUIREMENTS

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court upheld the constitutionality of a provision of the Public Works Employment Act of 1977 which required a set-aside of at least 10% of federal funds granted for local construction projects to minority-owned businesses. Although seven Justices concluded that the minority set-aside plan was constitutional, they did so in three different opinions, using differing tests and analyses. However, a three-pronged test has emerged from the Fullilove case that combines the concerns expressed in the various opinions; virtually every district and circuit court addressing this issue has employed this test:

- (1) The governmental body adopting the plan must have

the authority to choose such a remedy;

- (2) The plan must have a valid remedial aim--i.e., it must be designed to eliminate the effects of past discrimination; and
- (3) The plan must be narrowly tailored to its remedial aim.

See, e.g., J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 188 (4th Cir. 1985); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 904 (3rd Cir. 1984); South Florida Chapter of Assoc. General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846, 851 (11th Cir. 1984).

1. Institutional Authority

In Fullilove, all of the justices who upheld the constitutionality of the set-aside plan agreed that Congress has the responsibility for enforcing equal protection guarantees and has particular competence in identifying and remedying past discrimination. See 448 U.S. at 483, 500. Implicit in Fullilove is the idea that state legislative bodies are also competent to adopt affirmative action programs in order to ensure equal protection to persons within their jurisdictions. "When a state legislature takes steps in compliance with the equal protection clause it is acting in the same capacity as that of Congress in adopting legislation . . ." Ohio Contractos Association v. Keip, 713 F.2d 167, 172 (6th Cir. 1983).

The circuit courts are unanimous in holding that

state legislative bodies have the authority to adopt and implement affirmative action plans; the courts have also extended this power to state political subdivisions and to any other body to which authority has been clearly delegated under state law. See, e.g., Ohio Contractor's Ass'n. v. Keip, 713 F.2d at 172 (Ohio General Assembly); South Florida Chapter v. Metropolitan Dade County 723 F.2d at 852 (county commission); J.A. Croson Co. v. City of Richmond, 779 F.2d at 188 (city council); Kromnick v. School Dist. of Philadelphia, 739 F.2d at 907 (school district); Detroit Police Officers' Association v. Young, 608 F.2d 671, 694 (6th Cir. 1979) (Board of Police Commissioners).

The Boston Redevelopment Authority (BRA) is clearly an entity which has the authority to adopt and implement an affirmative action plan. The BRA acts as a redevelopment authority pursuant to M.G.L. c.121B; as the State Housing Board in connection with the administration of urban renewal projects pursuant to M.G.L. c.121A; and as the Planning Board of the City of Boston pursuant to M.G.L. c.41, s.70. Moreover, in the case of the Parcel 18 Project, the BRA is explicitly authorized by agreement to act as the agent for the Commonwealth of Massachusetts, the City of Boston, and the MBTA, to create and implement a plan for the development of that parcel of land. (Agreement of July 31, 1985.)

2. Remedial Aim

The Justices in Fullilove expressed their concern that a governmental body enacting an affirmative action plan must be remedying the effects of past discrimination rather than advancing one racial or ethnic group's interest over another.

In Fullilove, the court found authority for Congress to adopt the minority set-aside plan on the basis of a legislative "backdrop" which made members aware of the problems facing minorities and the need for affirmative action legislation. 448 U.S. at 467. This "backdrop" was primarily based on reports by the House Committee on Small Business and the U.S. Commission on Civil Rights, and a report on the operation of the Office of Minority Business Enterprise, created by an Executive Order authorizing the agency to assist the development of minority businesses. 448 U.S. at 466-467. This general data on the problems facing minority business enterprises and the economic disadvantages of minorities throughout the U.S. was sufficient to justify the legislation; the court explicitly stated that Congress did not have to make specific factual findings. The court stated that to do so would be to treat Congress "as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law." 448 U.S. at 502-503.

In reviewing the "findings" made by governmental agencies enacting affirmative action plans, the courts are extremely cognizant of this distinction between "legislative" and "judicial" fact finding. In J.A. Croson v. City of Richmond, for example, the court stated:

We review not the findings of fact which underly a judicial decision but those of a legislative branch of government (here a divisoin of state government) to determine if it has carried out its function in a constitutionally acceptable manner. Our review would be more intrusive into the fact-finding process, and the limitations we impose on the finders of fact would be stricter if we were reviewing a judicially created remedy. 779 F.2d at 188. (emphasis added)

Therefore, while the courts do require that the governmental agency make "findings", it is clear that these findings are not subject to rigorous review. As one court stated, "only minimal findings are required, however, for they need only be sufficient to provide a 'rational basis' for the conclusion that present practices could perpetuate past discrimination." Southwest Washington Chapter, Nat'l. Electrical Contractors Ass'n. v. Pierce County, 100 Wash.2d 109, 667 P.2d 1092, 1099 (Wash. 1983); see also, J.A. Croson Co. v. City of Richmond, 779 F.2d at 190 (court need only determine if legislative history demonstrates that city council could have reasonably concluded that past discriminaton led to current conditions).

a. Specific Findings

Some of the sources relied on by governmental bodies, and upheld by the courts as sufficient to justify affirmative action programs include:

- Historical records of city contract awards
- Statistical study (showing gross statistical disparity between city's minority population and number of contracts awarded to minorities over 5-year period);

(J.A. Croson v. City of Richmond, 779 F.2d 181, 189-190 (4th Cir. 1985)).

- Fifteen year history of legal proceedings against the School District, (directed to effect integration of the Philadelphia school system);

(Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 904 (3rd Cir. 1984)).

- Three reports compiled by independent investigations (showing economic disparity between the black community and other communities in Dade County; also demonstrating prior discrimination against Dade County black contractors at some point prior to present affirmative action program)

(South Florida Contractor Chapter v. Metropolitan Dade County, 723 F.2d 846, 853 (11th Cir. 1984)).

- a series of gubernatorial executive orders (designed to increase the participation of minority businesses in state contracts);

- the report of a task force established by the State

Attorney General (which found a severe numerical imbalance in the amount of business the state transacted with minority and non-minority businesses);

-- case law in the state courts (showing prior discrimination against minorities in construction and other industries)

(Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 171 (6th Cir. 1983)).

-- meetings between school district officials and construction industry representatives;

-- statistical disparity between minority population and number of minorities awarded school construction contracts;

-- declaration of school superintendent (that non-white contractors complained they had been excluded from school construction contract bids)

(Schmidt v. Oakland Unified School District, 662 F.2d 550, 558 (9th Cir. 1981)).

-- meetings between city council and interested parties;

-- state executive order

(Southwest Wash. Chapter v. Pierce County, 667 P.2d 1092, 1100 (Wash. 1983)).

While the courts require that a legislative body make findings, it is clear from the above-mentioned cases that these findings can be based on any materials gathered by or presented to the body which indicate the need for an affirmative action program. The findings are often

industry-specific (e.g., showing disparity between minorities in the population and minorities awarded construction contracts) but also take into account data as to the general status of minorities in the affected community (e.g., income, unemployment, etc.). It is also evident that executive orders and prior case law in the jurisdiction have great significance.

In the case of the proposed Parcel 18 set-aside, this kind of data is readily available. In addition to numerous studies about the minority populations in Boston and Roxbury, statistical data about minorities in contracting and other industries, case law demonstrating discrimination against Boston's minorities in several endeavors including construction contracts, there are also gubernatorial and mayoral executive orders promoting minority business enterprises. (See pages 14-16).

b. The Implications of Perini for an Affirmative Action Set-Aside Plan in 1986

It seems clear from the foregoing discussion that the district court's decision in Perini Corporation v. Mass. Bay Transportation Authority, (Sept. 22, 1980) would be of limited applicability today. In his unpublished Order in Perini, Judge McNaught ruled that, in order to meet constitutional requirements, an agency must itself make specific findings of identified or identifiable past discrimination, and that "Findings by others are not

sufficient support to constitute or demonstrate a compelling state interest." (p.7). First, it is evident that "findings by others" have been relied upon by numerous legislative bodies throughout the country, and that courts have repeatedly upheld this type of reliance (e.g., studies and task force reports). As the court in Fullilove noted, Congress itself relied on the reports of other legislative, administrative and private bodies in adopting its public works set-aside plan. What Judge McNaught probably meant was that the agency enacting the plan must adopt the findings of others as its own, and must rely on those findings in order to demonstrate the need for a particular affirmative action plan prior to enacting it. This interpretation of Judge McNaught's decision is bolstered by his refusal to allow the MBTA to rely on a report prepared one year after its set-aside plan had been announced, and which report seemed virtually unknown to the Chairman of the MBTA. (p.8). Regardless of his probable meaning, however, it is clear that findings of others will suffice to justify an agency's adoption of an affirmative action plan, if the agency relies on such findings.

Second, the court's requirement that there be findings of "identified or identifiable past discrimination" is also not controlling. While an agency must demonstrate the need for a remedial plan, it can demonstrate such past discrimination through statistical disparities and other

evidence of de facto discrimination or underrepresentation of minorities in a particular industry or sector of society. The issue of whether specific findings of identified discrimination are necessary relates to the distinction noted earlier between legislative and judicially-created remedies. When legislative remedies are at issue, the standard of review is not the "compelling state interest" that Perini mandates, but the lesser standard enunciated in the several cases that have followed Fullilove. Thus, while a court might well have to find identifiable discrimination in order to justify imposing an affirmative action plan, a legislative body can rely on the more general findings discussed above when voluntarily adopting one.

Moreover, in the related area of affirmative action employment consent decrees, the First Circuit has explicitly held that findings of victim-specific discrimination are not necessary. In the recent case of Massachusetts Association of Afro-American Police v. Boston Police Detectives Benevolent Society, 780 F.2d 5 (1st Cir. 1985) (MAAAP), the court ruled that where a voluntarily adopted affirmative action plan is at issue, Title VII does not require that minority employees benefitted by the plan be actual victims of previous illegal discrimination. (It is noteworthy that in so ruling, the First Circuit was affirming the opinion of the district court, which was written by Judge McNaught in 1985). The court ruled that the Supreme Court's

decision in Firefighters' Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984), which appellants claimed requires such findings, is limited to situations involving judicially-imposed (as opposed to voluntarily adopted) affirmative action plans, which directly conflict with a bona fide seniority system. The court noted that it relied upon decisions in several other circuits in reaching this conclusion, 780 F.2d at 8, citing several of the same decisions mentioned above.

Therefore, since this circuit does not require findings of identifiable victim-specific discrimination in the area of voluntarily-adopted affirmative action plans under Title VII, it would likely also follow the other circuits in not requiring such findings in the area of voluntary legislatively created set-aside programs.

In the final analysis, the Perini decision appears to have been all but eroded by subsequent decisions in other circuits and by this circuit's decision in MAAAP.

3. Narrowly-tailored Remedy

No Supreme Court opinion has required an agency to undergo a canvassing of alternative plans as a prerequisite for enacting a particular remedial affirmative action plan. In fact, this was expressly rejected in Fullilove, where the court held that affirmative action plans were not limited to the least restrictive means of implementation. 448 U.S. at 508.

The Court did express concern, however, that the plan be "narrowly tailored." The key factor emphasized by Chief Justice Burger in his opinion was the existence of a flexible waiver scheme; in Fullilove, this included procedures to identify non bona fide minority business enterprises, and an opportunity for potential grantees to demonstrate that, after making their best efforts, they could not succeed in meeting the MBE participation goal. 448 U.S. at 487-89. To Justice Powell, narrow tailoring meant taking into account such factors as a waiver scheme, the planned duration of the plan, and the effect on innocent third parties. 448 U.S. at 510-11. Both Justices also noted with approval that the plan at issue in Fullilove was subject to Congress' continuing reassessment and review.

The Parcel 18 project is a demonstration program, not the regulation and control of the private development market, and as such is of finite duration and scope. As a thirty percent/seventy percent minority/majority developer joint venture, the plan's effects on the non-minority population would likely be deemed minimal under existing judicial standards.

In South Florida Chapter v. Metropolitan Dade County, 723 F.2d 846 (11th Cir. 1985), the court approved a 100% set-aside as applied to one particular construction project. The court determined that a "totality review" is the appropriate means for ascertaining whether a program is

narrowly-drawn as applied to one project. A totality review examines the impact of a project on a governmental agency's total budget and the total amount expended on contracting. The court found support for this kind of review in Fullilove, where all the justices voting to uphold the statute compared the 10% set-aside to the total expenditures by the U.S. government on construction contracts. 723 F.2d at 885, (citing to 448 U.S. 484 n.72, 514, 521). See also, Ohio Contractors Ass'n v. Keip, 713 F.2d at 173 (when total construction market is considered, the percentage of contracts set aside is significantly lower). In the South Florida case, the cost of the project was less than 1% of the county's annual expenditure on contracts; considering the small percentage of overall contracts affected by this set-aside, the impact on third parties was deemed minimal. Id. See also, Ohio Contractors Ass'n v. Keip, 713 F.2d at 173 ("burden" on non-minority contractors less than one-percent of the total). The court also focused on the area in which this particular project was located; given the overwhelming number of minorities in that area, the high set-aside was reasonable. Id.

Given the demonstration nature of the set-aside at issue here, the effect on the City's overall contracting budget and the multi-billion dollar private development economy is obviously minimal. Moreover, given the disproportionately minority population in the Parcel 18 area, the 30% set-aside

is clearly reasonable.

The following materials, among others, can be relied upon by this agency as the basis for Findings justifying the adoption of an affirmative action set-aside plan. These materials should be expressly referenced to when the time comes for formally adopting such a plan:

-- Mayoral Executive Order of June 28, 1978, entitled "Encouraging Minority Business Enterprise" requires that at least ten percent (10%) of the value of all construction, goods, and services procured by the City during each fiscal year will be obtained from MBEs. (An MBE is defined as a business organization in which at least 51 percent of the beneficial ownership is held by one or more minority persons.) When the work will be performed in an "impact area" the required set-aside is 30 percent. Roxbury is designated as an impact area.**

-- State Executive Order No. 237, issued March 19, 1984 and entitled "Minority Business Development," provides that each executive office, agency, department and commission should achieve a MBE goal of at least 10 percent of the total value of construction contracts. The preamble states that the Order is based in part on the fact that MBEs "frequently face inordinate problems in achieving viable economic status" and "are underrepresented among the enterprises doing business with state government."

-- Municipal law entitled "The Boston Residents Jobs Policy," Ordinances of 1983, Chapter 30, the City of Boston, which notes in the preamble that minority residents "have historically been systematically excluded from the construction trades and unions in the City of Boston." The Ordinance required a 50% set-aside for Boston residents, a 25% set-aside for minorities, and a 10% set-aside for females in total man-hours for each trade involved in any construction project funded in whole or part by city-funds.

-- HUD regulations for UDAG eligibility allow MBE participation to include ownership. In 24 CFR s.570.459, "Extent of Minority Job Participation," HUD states that it will more favorably consider projects in which minorities are participants in the projects; they may be "prime or subcontractors during development, major suppliers of construction goods, or equity investors, or they may participate in the project through leasing, ownership, or rehabilitation of property, ongoing vendors and suppliers of goods and services, or as private participating parties."

-- Case law in this jurisdiction evidencing discrimination against minorities in the construction industry: See, e.g., Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), in which the court upheld an affirmative action plan for hiring specific percentage of minority workers on

construction projects. The court cited as evidence for the constitutionality of this plan the long history of discrimination in the construction industry, the low percentage of minority employees in the construction industry in Massachusetts, and the "compelling need to remedy serious racial imbalance in the construction trades, particularly in Roxbury, Dorchester, and South End . . ."

-- Studies and Reports, including:

"The Emerging Black Community of Boston," report by the Institute for the Study of Black Culture, University of Massachusetts at Boston (October 1985), stressing history of discrimination in construction industry, especially in craft unions; failure of unions to comply with Boston Jobs Residents Policy, etc.

Minority Business Study, City of Boston Minority Business Office (May 1978), indicating that minorities received a miniscule number of contracts under the 1975 minority business policies.

"Black-Owned Business Enterprises in the City of Boston and Black Labor Force," Jeffrey P. Brown, B.R.A. Research Dept. (March 1986), emphasizing difficulties faced by minority-owned businesses, and low percentage of MBE representation in various industries.

**It is worthy of note that in 1983, the Supreme Court upheld the constitutionality of the Mayor's Executive Order,

in White v. Mass. Council of Construction Employers, 460 U.S. 204 (1983). At issue in the case was the requirement that at least 50% of the workforce on city construction projects be "bona fide Boston residents." However, it is clear that the Court was aware of the 25% minority set-aside provision in the Executive Order (the entire Order is set out in the case), and nowhere did the Court so much as imply that this provision might be unconstitutional. To the contrary, in its discussion of the significant federal funding involved in the City's construction projects (e.g., UDAG & CDBG funds) the Court stated:

An examination of the applicable statutes reveals that these federal programs were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed. Examination of the [federal regulations] indicates that the Mayor's Order sounds a harmonious note . . . 406 U.S. at 213 (emphasis added).

Indeed, in support of this argument, the Court cited several federal regulations, including 24 CFR s.570.458(c)(1982), in which HUD requires that a city receiving UDAG funds must certify that the project will alleviate economic distress by helping the poor, minorities and unemployed, and 24 CFR s.135.1(a)(2)(i)(1982), which provides that under the Housing and Urban Development Act of 1968, "to the greatest extent feasible opportunities for training and employment arising in connection with the planning and carrying out of any project assisted under any

such program be given to lower income persons residing in the area of such project." Id. at 213.

This implicit approval of Executive Orders which embody minority set-aside plans is especially noteworthy given that the Court's 8-member majority opinion was written by Justice Rehnquist, who could have used this case as a springboard for commenting on the appropriateness of the affirmative action plan.

Recent Developments

The United States Supreme Court continues to address the area of affirmative action in plurality decisions which makes prediction with surety difficult. While the Court has recently been reviewing affirmative action plans more closely, the recent cases (such as Stotts) are distinguishable on their facts.

It should be noted however, that in May of 1986, a plurality of the Supreme Court indicated that affirmative action plans will be subject to strict scrutiny, requiring that a governmental entity find evidence of prior discrimination by the governmental entity before adopting such a plan. Wygant v. Jackson Board of Education, 106 Supreme Court 1842 (1986). The First Circuit, in August of this year, took note of the Wygant case, and indicated that governmental entities may be prohibited from employing affirmative action plans in the absence of a prior finding of discrimination by the governmental entity. Latinos Unidos de

Chelsea En Accion v. Secretary of Housing and Urban Development, (No. 85-1573, 1st Cir., Aug. 12, 1986).

However, Wygant involved a provision in a collective bargaining agreement that would protect minority employees against layoffs, and the Court emphasized its concerns about the interference of the agreement on vested seniority rights of non-minority group members. The Court itself distinguished layoff plans from affirmative action plans for hiring:

In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job. 106 S.Ct. at 1851.

As the Parcel 18 set-aside involves the creation of new development opportunities, and not the interference with existing rights, it appears to come within this line of analysis. Moreover, as a demonstration program of necessarily limited scope, the burden it will have on non-minorities is further reduced.

